

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CARLO SENECA** : DETERMINATION  
 : DTA NO. 829298  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 of the :  
Tax Law for the Period December 1, 2014 through :  
November 30, 2016. :  
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Petitioner, Carlo Seneca, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2014 through November 30, 2016.

On July 22, 2022, petitioner, appearing by Polsinelli, P.C. (Scott Ahroni, Esq., of counsel), and on July 21, 2022, the Division of Taxation, appearing by Amanda Hiller, Esq. (Bruce D. Lennard, Esq. and Melanie Spaulding, Esq., of counsel), waived a hearing and submitted the matter for determination pursuant to 20 NYCRR 3000.12. All documents and briefs were to be submitted by February 24, 2023, which date began the six-month period for the issuance of this determination.

Based upon all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner, Carlo Seneca, was personally liable for the sales and use taxes due on behalf of Eden Ballroom, LLC, as a person required to collect and pay such taxes under the Tax Law.

***FINDINGS OF FACT***

The parties executed a joint stipulation of facts and documents, and the facts stipulated to therein are incorporated below where appropriate. The Division has submitted additional proposed findings of fact in a narrative format without numbering any of the proposed findings of fact. Since the Division has not separately numbered each of the proposed findings of fact, they have not been ruled upon. However, with certain modifications, they have been generally accepted. Petitioner submitted additional proposed findings of fact. Petitioner's additional proposed findings of fact have been largely accepted and incorporated herein to the extent deemed appropriate; however, parts of petitioner's proposed findings of fact 9, 10, 19 and 20 are rejected as argumentative, conclusory or not sufficiently supported by the record cited to.

1. The Division of Taxation (Division) conducted a sales tax audit of Eden Ballroom, LLC (Eden Ballroom) for the period of December 1, 2014 through November 30, 2016 (audit period) and determined that Eden Ballroom owed the State additional sales and use taxes.

2. As part of the audit, the Division determined that petitioner, Carlo Seneca, was a responsible person of Eden Ballroom.

3. The Division issued notice of determination L-047838954, dated March 26, 2018, to petitioner, in the amount of \$771,820.03 in tax, plus interest and penalty, as a responsible person for the sales taxes due from Eden Ballroom for the period of December 1, 2014 through November 30, 2016.

4. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice of determination number L-047838954. A conciliation conference was held on October 16, 2018, and on January 18, 2019,

BCMS issued a conciliation order (CMS No. 000302526) sustaining notice of determination number L-047838954.

5. Petitioner filed a petition challenging the conciliation order (CMS No. 000302526).

6. Petitioner filed a motion, dated March 16, 2022, to dismiss a claim for personal per se liability. In support of petitioner's motion, petitioner submitted the affidavit of Lawrence Cole, CPA (petitioner's representative at the time), sworn to on March 16, 2022. In his affidavit, Mr. Cole indicated that he was petitioner's representative and that he attached "true and accurate" copies of the 2013 through 2016, Eden Ballroom annual federal schedule K-1s. Attached to Mr. Cole's affidavit were, what were represented by Mr. Cole to be Eden Ballroom's annual federal schedule K-1s for 2013 through 2016. Each of the 2013 through 2016 Eden Ballroom schedule K-1s indicates that complete ownership of Eden Ballroom was split evenly between MC Hospitality, LLC, and Ibiza United Space, LLC. In support of petitioner's motion, Mr. Cole submitted a memorandum of law, wherein he asserts that the federal schedule K-1s he provided establish that petitioner was not a member or partner of Eden Ballroom during the audit period and therefore petitioner was not per se liable for its sales and use taxes due to the State. The undersigned ruled that the motion would be addressed in the final determination of this matter.

7. Petitioner does not dispute the dollar amount and calculations of the relevant notice at issue. Furthermore, petitioner does not challenge that Eden Ballroom owes the State the sales and use taxes at issue.

8. In support of its position, the Division submitted the affidavit of Julieta Bell, Section Head and Tax Auditor III, sworn to on August 24, 2022. Ms. Bell was involved with the audits of Eden Ballroom and petitioner and subsequently reviewed the related audit file for the matter. In her affidavit, Ms. Bell averred that the Division determined that petitioner was a responsible

party for Eden Ballroom based upon the following evidence which petitioner had provided to the Division and were included as attachments to her affidavit:

- (i) a consent to extension of time for the audit of Eden Ballroom, signed by petitioner on January 17, 2018 as “investor” (consent);<sup>1</sup>
- (ii) a sales tax examination questionnaire for Eden Ballroom, dated May 23, 2017, signed by another person but identifying petitioner as a “managing member” of Eden Ballroom; and,
- (iii) an application to register for sales tax certificate of authority, form DTF-17, dated October 21, 2013, signed by another person but identifying petitioner as one of two responsible persons of Eden Ballroom.

9. In support of his position, petitioner submitted:

- (i) the affidavit of Lawrence Cole, CPA, dated October 25, 2022. Mr. Cole affirmed that he was engaged by Eden Ballroom to represent it in the sales tax audit carried out by the Division, that petitioner was not a member of Eden Ballroom, that the Division erroneously assessed petitioner as a responsible person of Eden Ballroom because there were no supporting documents for the Division’s conclusion, that he is familiar with the consent signed by petitioner and he was present when petitioner signed the consent and such was done based upon the erroneous advice of another CPA, Chandra Panchmia, who subsequently passed away, and that petitioner did not have authority to execute the consent on behalf of Eden Ballroom;
- (ii) the affidavit of Joseph Prego, sworn to in October, 2022, who was the general manager of Eden Ballroom from approximately June 2014 through January 2015. Mr.

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<sup>1</sup> In his opening brief, petitioner concedes that he signed the document.

Prego affirmed that as general manager of Eden Ballroom, he was in charge of the business operations, management, and financial affairs of the entity, and during that time petitioner was not an owner or manager of Eden Ballroom, petitioner's involvement with Eden Ballroom was limited to providing construction work for the entity, and petitioner did not receive a salary from Eden Ballroom or write checks or otherwise manage the entity;

(iii) the affidavit of Destiny Domingos, sworn to on October 25, 2022, who was the floor and bottle service manager of Eden Ballroom from approximately November 2014 through January 2015. Ms. Domingos affirmed that during that time she worked with Mr. Prego and assisted with the management of Eden Ballroom, petitioner was not involved with the management of the entity, and petitioner's work for Eden Ballroom was limited to construction work; and

(iv) a copy of Eden Ballroom's schedule K-1s for 2013 through 2016. The schedule K-1s for each year reflect parties other than petitioner as the owners of Eden Ballroom.

***SUMMARY OF THE PARTIES' POSITIONS***

10. Petitioner asserts that he cannot be held liable as a responsible party under the Tax Law since he was not a member/owner of Eden Ballroom and the Prego and Domingos affidavits establish that he did not manage the entity.

11. The Division asserts that since petitioner was a managing member of Eden Ballroom, petitioner is liable for Eden Ballroom's associated sales and use taxes due to the State. The Division also asserts that petitioner has failed to meet his burden of proof to establish that he was not a responsible party for Eden Ballroom.

### **CONCLUSIONS OF LAW**

A. Tax Law former § 1133 (a) provided, in part, that: “every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article.”

B. During the years at issue, Tax Law former § 1131 (1) provided in relevant part:

“‘Persons required to collect tax’ or ‘person required to collect any tax imposed by this article’ shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article; and any member of a partnership or limited liability company.”

During the years at issue, the Tax Law contained no factors to qualify or limit the liability imposed upon members of partnerships or limited liability companies and imposed per se liability upon such members (*see Matter of Santo*, Tax Appeals Tribunal, December 23, 2009). [“Petitioner was a member of a limited liability company and, as with members of a partnership, such members are subject to per se liability for the taxes due from the limited liability company. . . . Since Tax Law former § 1131 (1) imposes strict liability upon members of a partnership or limited liability company, all that is required to be shown by the Division for liability to obtain is the person’s status as a member.”]; *see also Matter of Bartolomei*, Tax Appeals Tribunal, April 3, 1997). Clearly, Tax Law former § 1131 (1) provides that any member of a partnership or any member of a limited liability company is a “person required to collect any tax imposed by this article” and, as provided in Tax Law former § 1133 (a), a member of a limited liability company “shall be personally liable for the tax imposed, collected or required to be collected under this article.” Accordingly, if petitioner was a member of the LLC, Eden [Ballroom](#), during the audit

period, he would be personally liable for the sales tax required to be collected and remitted to the State from that entity.

C. Petitioner bears the burden of proof to overcome the presumed correctness of the Division's assessment (*see Matter of Mera v Tax Appeals Trib.*, 204 AD2d 818 [3d Dept 1994]; *see also Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437 [3d Dept 1986], *appeal dismissed* 69 NY2d 822 [1987]). In this case, petitioner has sufficiently met his burden of proof to show that he was not a member of Eden Ballroom during the years at issue.<sup>2</sup> As proof that petitioner was a member of Eden Ballroom, the Division refers to the consent signed by petitioner as an "investor," the sales tax examination questionnaire for Eden Ballroom signed by another person but identifying petitioner as a "managing member," and the application to register for a sales tax certificate of authority signed by another person but identifying petitioner as one of two responsible persons of Eden Ballroom. Challenging this proof, petitioner provides copies of Eden Ballroom's K-1s for the years in question which indicate parties other than petitioner were the owners of the business. Petitioner also provided the affidavit of Eden Ballroom's CPA, who claims petitioner was not a member of Eden Ballroom and mistakenly signed the consent based upon the erroneous advice of another CPA who has passed away and, moreover, that petitioner did not have authority to execute the consent in the first place.<sup>3</sup>

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<sup>2</sup> Tax Law former § 1133 (a) was amended, effective April 12, 2018, to provide that if a limited partner of a limited partnership or member of a limited liability company applies to the Division for relief and demonstrates to the satisfaction of the Commissioner that such limited partner's or member's ownership interest and the percentage of the distributive share of the profits and losses of such limited partnership or limited liability company are each less than fifty percent, and such limited partner or member was not under a duty to act for such limited partnership or limited liability company in complying with any requirement of article 28, that the limited partner's or member's liability will be limited to reflect such limited partner's or member's ownership interest of distributive share of the profits and losses of such limited partnership or limited liability company, whichever is higher. The relief provided for in the amendment was not in effect during the periods at issue, and as noted above, Tax Law former § 1131 (1), as in effect for the periods at issue, imposed strict liability upon members of a partnership or limited liability company.

<sup>3</sup> In making this assertion, Mr. Cole admits that he was also present while petitioner inappropriately signed the consent. Apparently, Mr. Cole did nothing to prevent this error that he now wishes to correct.

Petitioner also notes that he did not sign the other documents that the Division relies upon and refers to the affidavits of Mr. Prego and Ms. Domingos, Eden Ballroom's managers, who attested that petitioner was not a member of the company. In weighing the evidence, it is determined that petitioner was not a member of Eden Ballroom for the years at issue. Accordingly, petitioner is not held liable as a responsible person of Eden Ballroom based upon the status of being a member.

D. In addition, individual liability for an LLC is not limited to just members of the business. Aside from the strict liability imposed on a member of an LLC, whether an individual is personally liable for tax under Tax Law former § 1131 (1) is determined upon the particular facts of each case (*see Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [3d Dept 1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3d Dept 1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890 [3d Dept 1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The pivotal question to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*see Matter of Capeci*, Tax Appeals Tribunal, February 23, 2023). In this case, the Division determined that petitioner was a responsible person based upon the aforementioned evidence attached to the Bell affidavit. As noted above, a presumption of correctness attaches to a properly issued statutory notice issued by the Division and the taxpayer bears the burden to prove that the assessment is incorrect. In this case, petitioner relies on the affidavits of Mr. Prego and Ms. Domingos to establish that petitioner is not a responsible

person.<sup>4</sup> Both Mr. Prego and Ms. Domingo attest that they were managers of Eden Ballroom and petitioner did not manage the corporation during the time they held such positions. In light of the evidence indicating otherwise, it is determined that based upon the affidavits of Mr. Prego and Ms. Domingo, petitioner has met his burden of proof establishing that he was not a responsible person for the collection of sales tax; however, as noted in their respective affidavits, Mr. Prego's assertions are limited to June 2014 through January 2015, and Ms. Domingo's assertions are limited to November 2014 through January 2015. Outside of these time frames, petitioner has failed to meet his burden of proof sufficiently to rebut the presumption that the Division's assessment is correct. Accordingly, petitioner is found liable as a responsible person of Eden Ballroom for the periods at issue, except for the period of June 2014 through January 2015.

E. The petition of Carlo Seneca is granted in accordance with conclusion of law D, but in all other respects is denied, and notice of determination L-047838954, dated March 26, 2018, as modified by conclusion of law D, is sustained.

F. The motion of Carlo Seneca, dated March 16, 2022, seeking to dismiss the Division's assertion of personal per se liability against him, is granted in accordance to conclusion of law C.

DATED: Albany, New York  
August 24, 2023

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE

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<sup>4</sup> The affidavit of Lawrence Cole, CPA, petitioner's former representative and Eden Ballroom's representative, is given limited weight (*see Matter of Wisdom*, Tax Appeals Tribunal, April 9, 1998).